Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

No. _____

John Hall Thomas,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari

To The United States Court of Appeals

For The Fifth Circuit

Petitioner's Application For Writ of Certiorari

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48pp

QUESTIONS PRESENTED

1. Twelve officers representing six law enforcement agencies[1] were party to manufacturing a "bogus" undercover audio tape wherein a law officer dubbed as the defendant/petitioner, a medical doctor. The fabricated evidence was used in every phase of the legal proceedings to obtain a conviction, wherein the defendant/petitioner was coerced into pleading "guilty."

Further, the sentencing judge ruled against the defendant/petitioner's motion to withdraw the coerced guilty plea after reading, *before the hearing*, the PSI (Pre-Sentence Investigation) report containing quotes from the "bogus" tape. The petitioner, based on newly discovered supportive evidence (about the tape) released from investigative files and other sources, sought redress through the sentencing court by writ of *coram nobis*. The Fifth Circuit upheld the District Court's dismissal of the *coram nobis* application without a hearing saying the evidence was not "newly discovered evidence" as the defendant/petitioner had discussed the tape with his attorney and claimed the voice was not his voice on the tape at that time. Did the district court err by: (1) not holding a hearing; and (2) denying the petition?

2. The Circuit Courts have produced varying opinions about whether "newly discovered evidence" can afford entree to a writ of *coram nobis*. A confusion is present as the Fifth Circuit has never explicitly stated that newly discovered evidence cannot be

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1 Nacogdoches Police Department, (2 agents): Texas Department of Public Safety, (3 agents): Drug Enforcement Agency, (1 agent); Texas State Board of Pharmacy, (2 agents); Harris County Sheriff Office, (2 agents); Dallas Police Department, (2 agents).

grounds for *coram nobis* relief, while other circuits have held that it can if certain conditions are met. What should the standard be on this issue of "newly discovered evidence" as it relates to writ of *coram nobis*?

3. An egregious error has been committed with imprisonment for two years and loss of medical licensure for the past 15 years based on fabricated evidence. Yet, the courts, although tacitly admitting that the evidence was fabricated, are not willing to grant a hearing on the matter. Should the very courts that were prejudiced by the fabricated evidence now be the judge and jury in keeping the petitioner from a judicial review of this evidence through the writ of *coram nobis*?

4. The only exculpatory evidence available to a medical doctor accused of prescription violations was his medical records. Using excerpts from the fabricated tape in an affidavit, the government obtained a federal warrant to seize *all* medical records eight months prior to trial. No part of these records was released to the accused though repeated requests were made and the warrant called for copies to be supplied. Is this an error warranting *coram nobis* relief?

5. Petitioner's counsel of record in his criminal proceedings, Charles Butts, coerced the defendant/petitioner into pleading guilty. Later he became a government witness against the defendant/petitioner when he tried to withdraw his guilty plea. He then represented the petitioner at the same hearing when the judge was hearing testimony on sentencing. Is this acceptable behavior or does it represent ineffective/malicious assistance of counsel?

6. The sentencing judge read the PSI report *prior* to a hearing wherein the defendant/petitioner had a motion pending to withdraw his guilty plea. The

judge was prejudiced by the report. Is this grounds for *coram nobis* or other relief?

7. Should the courts require a petitioner to show "lingering civil disabilities" as the result of a conviction as a condition before issuance of a writ of *coram nobis*?

PARTIES

Fifth Circuit U.S. Court of Appeals
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New Orlean, LA 70130

Eastern District of Texas
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OPINIONS BELOW

The United States District Court for the Eastern District of Texas denied the petitioner's application for writ of *coram nobis* on 4/5/94 stating a written opinion

would follow. (app. at A-1) This was *nine months* after the petition was filed on 7/23/93.

An order with a written opinion (app. at A-2) from the Eastern District of Texas followed on 9/14/94; however, appeal had been taken from the first order denying the writ.

The Fifth Circuit opinion confirming the district court (app. at A-6) was filed on February 23, 1995.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction is according to 28 USC Sect. 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ...

This application is made in reference to an "Order" by the Fifth Circuit Court of Appeals entered on February 23, 1995 (app. at A-6), affirming a ruling in the Eastern District of Texas (app. at A-1).

The petition is timely filed as per Rule 13.1 (Rules of the Supreme Court):

> A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment.

Ninety days from the filing on 2/23/95 is 5/24/95.

RELEVANT STATUTORY PROVISIONS

US CONSTITUTION

Amendment Five: "No person . . . be deprived of life, liberty, or property, without due process of law; ...."

Amendment Fourteen: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OTHER STATUTORY LAW

28 USC Sect. 1651: (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 16(a)(1)(C) F.R.Criminal Procedure: Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

STATEMENT OF THE CASE

Petitioner, a medical doctor in Texas,[2] was indicted on 62 counts of violating Title 21 of the US Code related to writing unlawful prescriptions on 8/18/82. He was arraigned on 8/30/82. A superseding indictment was filed adding a continuing criminal enterprise charge and a second arraignment took place on 10/15/82. At the trial on 1/24/83, Thomas pled guilty to one count of prescribing twenty-eight pills of a non-narcotic after undergoing arm twisting, coercion and threats by his attorney of record, Charles Butts.[3]

Prior to sentencing and after moving his family out of the jurisdiction of Texas[4], Thomas filed a *pro se* motion to withdraw his guilty plea. (app. at A-10) A hearing was held on 4/15/83 wherein the petitioner's former attorney, Charles Butts and defendant/peti-

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2 Thomas was a solo practitioner in Nacogdoches, Texas, an east Texas town of about 25,000. His clientele were primarily the black indigent in the area. He was the County Health Officer and enjoyed full priveleges at the Nacogdoches Memorial Hospital where he had been a staff member for 10 years.

3 "When my lawyer and I went to the back of the court to talk, I received my next cussing and was advised I was, 'the stupidest son-of-a-bitch on earth,' and that if 'you do not make it good on this next count, I am going to have you put in a mental hospital.' This threat hit home, and I perjured myself on the next count to get a guilty plea." (Motion to Withdraw Guilty Plea, p. 2, app. at A11-A17)

4 Counsel Butts' coercion included a threat to put Thomas in a mental hospital if he did not cooperate by pleading guilty. Considering it takes the signature of two doctors to commit in Texas, the threat was real.

tioner's father[6] were sworn as government witnesses testifying on behalf of the government against Thomas. (app. at A9-10) Thomas' motion was denied and he was sentenced at the same hearing to 60 months in prison with 24 months of additional special parole. All terms of the sentence have been completed.

Thomas remains without a medical license as a result of the conviction even though he has applied for reinstatement in Texas and made application to other states.

Numerous attempts to obtain a judicial review of his case through *pro se* proceedings in the federal courts have failed[7] including application for writ of *habeas corpus*[8] and a Rule 35 motion for an illegal sentence[9]. To this date, nary a hearing has been scheduled related to the criminal conviction.

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6 Thomas' father, a strong political figure in Texas, initially feigned support for his son by hiring Charles Butts as a "good" criminal attorney. Later, he and Butts worked to coerce Thomas to plead guilty and conspired to obtain Thomas' interest in a family ranch left to him by his grandfather.

7 Petitioner is of the pursuasion that he is precluded from receiving fair judicial review through Texas Courts or the Fifth Circuit. For example, Judge Tom Reavely, a personal friend of the defendant's late father, was one of three judges affirming the initial conviction. (See fn. 15)

8 *Thomas v. U.S. Marshall, et al.* was filed in Kentucky where Thomas was an instant prisoner. This action filed under 28 USC Sect. 2241 was dismissed by the district court, *affd.* by the Sixth Circuit and petition for writ of *cert.* denied by the Supreme Court (85-6953).

9 Rule 35 Motion for Illegal Sentence filed 3/25/85, denial *affd.* by the Fifth Circuit 3/12/86 *cert* denied _____.

The current application in the district court for writ of *coram nobis* was precipitated by the court ordered release of investigative files from the Texas Board of Medical Examiners in July of 1992[10]. Investigative reports related to the Thomas federal indictment showed, among other facts, the audio tape used in all phases of the prosecution was *fabricated* by law officers dubbing as the voice of Thomas on the tape. In his petition to the sentencing court, Thomas showed the following three facts were unveiled as the result of the investigative files:

> 1. Investigators from several law enforcement agencies manufactured evidence in order to indict Thomas.
>
> 2. The Texas State Board of Medical Examiners requested law enforcement agencies to seize legal prescriptions prior to revocation of Thomas' license; and
>
> 3. False and misleading statistics were used in the PSI report to prejudice the court against Thomas at the April 15, 1983, hearing. (*Defendant's Petition for Coram Nobis*, pp. 3-4)

The district court petition for *coram nobis* developed each of these three issues plus others with supporting documents taken from the newly released files.[11]

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10 The partial records were released by court order in *Thomas v. Texas State Board of Medical Examiners*, a 42 USC Sect. 1983 action which was later dismissed on motion for summary judgment with confirmation by the Fifth Circuit.

11 In their opinion the Fifth Circuit made the following statement: "Thomas states in conclusory fashion that his newly discovered evidence shows that the inculpatory tape

The manufactured evidence issue (*Defendant's Petition for Coram Nobis*, pp. 4-13) developed the evidence proving that Allen Byrd, the undercover agent claiming to make the audio tape, never was "wired" with a recording device on the day in question.

The seizure of legal prescriptions issue #2 (*Defendant's Petition for Coram Nobis*, pp. 13-14) gave supporting documentation wherein Jim Bunch, Chief of Police of Bonham, Texas, sent a handwritten note confirming he had seized Thomas' legal prescriptions as requested by the medical board.[12]

The third issue of false and misleading statistics (*Defendant's Petition for Coram Nobis*, pp. 15-17) developed the evidence that false and misleading information was made a part of the PSI report. Thomas showed, using the investigative files, a 43% discrepancy between the actual statistics from Texas Department of Public Safety (DPS) files and that reported in the PSI report and in open court at the sentencing hearing.

In essence, many of the previous arguments Thomas raised in collateral attacks on his conviction were confirmed by the released investigative files.

The material facts presented in *Defendant's Petition for Coram Nobis* must be taken as true if the same principles apply regarding a motion to dismiss in

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was fabricated, but he never tells us how his newly discovered evidence supports that defense." (app. at A-8). The fact is Thomas devoted ten (10) pages and eight (8) exhibits proving up the support on the tape alone.

12 These legal prescriptions were seized from Thomas' black patients on 5/25/82. Thomas' license was revoked on 7/1/82.

a civil action. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 US 172, 174-175, 15 L.Ed.2d 247, 249, 250, 86 S.Ct. 347 (1965) The sentencing court failed to call an evidentiary hearing, therefore, the material allegations should be taken as true and liberally construed in favor of plaintiff. *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957).

Thomas requested in his petition that the court: (1) vacate the judgment; or (2) conduct a hearing to further investigate the facts noted in the petition, subpoena the tapes, and a order a voice analysis of the tapes.

SUMMARY OF ARGUMENT

Fundamental errors have been committed in the criminal conviction of the petitioner that flaw the entire judicial process and reach the threshold required for relief by writ of *coram nobis*. The presentation of manufactured evidence to the grand jury *ipso facto* is grounds for vacating the entire proceeding.

Suppression of exculpatory evidence by the prosecution and the court clearly reaches Constitutional error. Here is yet another argument in favor of granting a writ of *coram nobis*. See *Brady v. Maryland*, 10 L.Ed.2d at 218 (1963).

The purpose of the writ of coram nobis is "to remedy manifest injustice." *Rener v. United States*, 475 F.2d 125, 126 (5th Cir. 1973).

The petitioner continues to suffer immense damage even now, thirteen years after the indictment, as a result of his conviction and loss of medical license emanating from the manufactured tape, suppression

of evidence, coercion by counsel and ineffective/malicious counsel. There is present manifest injustice.

Thomas has served all terms of incarceration and parole and the legal mechanism of writ of *coram nobis* is the proper vehicle for relief.

ARGUMENT

I. THE ERRORS INVOLVED IN THOMAS' CONVICTION ARE FUNDAMENTAL IN CHARACTER

The fundamental error in *United States v. Morgan*, 346 U.S. 502, was a federal trial without counsel and without competent and intelligent waiver of counsel. *Id* at 512. In the case at hand, the fundamental error is a trial using an **imposter** posing as the accused. The imposter, then, is on trial with the grand jury, judge and attorney of record, not the defendant. The indictment was handed down against the imposter and not the defendant. The sentencing judge ruled against the defendant's motion to withdraw his guilty plea after reading the imposter's words from the PSI Report and not the defendant.

The *pro se* petitioner is counted as an unfortunate in the words of the Morgan Court, an unlettered prisoner who operates without friends or funds. *Darr v. Burford*, 339 US 200, 203,204. This unlettered *pro se* petitioner can only see an error of grave magnitude when men in positions of authority gather together and substitute an imposter on an audio tape for the voice of the accused. This unlettered *pro se* petitioner sees an even greater error when the lower courts appear to condone this practice or, at least, treat the petitioner *qui est extra legem*. There is a clear violation of the 14th and 5th Amendments.

> A criminal conviction procured by the state prosecuting authorities solely by the use of perjured testimony known by them to be perjured and knowingly used by them in order to procure the conviction, is without due process of law and in violation of the Fourteenth Amendment. *Mooney v. Holohan*, 294 U.S. 103, 112.

The petitioner has raised the issue every time in all of his collateral attacks on the conviction that his medical records, seized by federal search warrant on 5/19/82, were not returned prior to the trial in violation of Rule 16(a)(1)(C) (F.R.C.P.). The only exculpatory evidence for the accused, a medical doctor, was never released for his use.[13] This Court held:

> We now hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecutor. *Brady v. Maryland*, 10 L.Ed.2d at 218 (1963)

Again, the petitioner brings this issue to bear in his *coram nobis* application. (*Defendant's Petition for Writ of Coram Nobis*, p. 3)

The records were seized pursuant to a federal search warrant based on an affidavit (app.at A-24) by John Hitt who quoted parts of the "bogus" tape in order

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13 Thomas' letter to the judge which incorporated a request to withdraw his guilty plea made clear (1) his records were seized, (2) copies were not provided, (3) the records had been requested of the prosecutor and (4) they were his only defense. (app. at A-11to A-17)

to convince a federal magistrate of wrongdoing. Hence, the warrant was based on "fruit of a poisoned tree."

The search warrant called for copies to be made of the records, the defendant requested copies the day the warrant was executed, the petitioner wrote letters to the prosecuting attorney requesting release of the records (app. at A-22), and the discovery order called for inspection and copying of the records. Yet, no copies were provided and the records were not released prior to trial.

In addition, false and misleading statements were introduced into the PSI Report which prejudiced the sentencing judge and others. The accused could make no rebuttal to these statements as he did not have his own records. Thomas' *prescription* records have, to this day, never been released.[14]

The following lofty words seem idle talk to the petitioner and his experience with the federal courts:

> The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done for its citizens in the

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14 A *pro se* "Motion of Defendant to Compel Release of Evidence" to the Eastern District of Texas filed 9/12/84 while defendant/petitioner was in prison finally gained an order releasing most of the records 2 1/2 years after the federal seizure.

courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That cast the prosecution in the role of an architect of a proceeding that does not comport with standards of justice..." *Brady v. Maryland*, 10 L.Ed.2d at 218-219. (Emphasis added.)

II. THE FACTS, IF KNOWN, WOULD AFFECT THE OUTCOME OF THE TRIAL

If the parties involved in the conviction of Thomas had been aware the tape they heard was not the voice of Thomas, a much different outcome *should* have occurred. Thomas was a political target (See fn.6,7,15,16). Common sense will question why, if a medical doctor is committing violations in prescription writing, it takes twelve men to substantiate evidence of wrongdoing. A single undercover agent can obtain the needed information to convict or substantiate the wrongdoing.

The newly discovered evidence has nothing to do with guilt or innocence, but rather indicates a total subterfuge of the judicial process by fabrication and deceit. We are not dealing with prejudicial misconduct in the course of the trial, misbehavior or partiality of jurors or evidence related to guilt or innocence. Instead the error is more fundamental and heinous.

The released investigative files from the Texas Board of Medical Examiners showed a pattern of investigation of Thomas for eight years (1974-1982), not for any wrongdoing, but as a result of a pipeline dispute in 1974 wherein certain political entities with connections to the Texas Medical Board were able to exert pressure on the Board prosecutors to find wrongdoing on the part of Thomas.[15]

After listening to the fabricated tape on 8/30/82 (app. at A-18), Thomas' attorney of record, Chas. Butts, did not file a single motion on his behalf from the time of arraignment (8/30/82) to the time of trial (1/24/83). Apparently he was convinced of Thomas' guilt from the tape or he became a agent working for the prosecution. In either case, he was ineffective in his job of defending Thomas.

If the sentencing judge was aware the audio tape was that of an imposter, one would hope the outcome would have been different. Below are two places in the PSI Report wherein the "bogus" tape is referenced. Judge Justice read the PSI report *prior* to denying Thomas' motion to withdraw his guilty plea.

> "A review of the taped conversations between defendant and officer Byrd clearly indicated that Byrd advised defendant that he planned to illegally abuse the prescribed Preludin. He advised the defendant that he was 'going to shoot up twenty in five days.' Despite this comment, defendant issued officer Byrd the prescription." (PSI Report) (Emphasis added)

> "From a review of the taped dialogue between defendant and officer Byrd, it seemed apparent that defendant was aware that Byrd's sole purpose for returning to the clinic would be to obtain Preludin for illicit purposes." (PSI Report) (See Tape Transcript, app. at A-18) (Emphasis added.)

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15 Texas politics continues to play a role. Although Thomas, on appeal to Fifth Circuit, listed "Any judges with political ties to the State of Texas" in his "Certificate of Interested Parties," two out of three Fifth Circuit Judges hearing the appeal were from Texas.

As indicated above, the sentencing judge read the PSI Report prior to ruling on Thomas' motion to withdraw his guilty plea and was thus prejudiced by the report and references found in the audio tape. We can only speculate on the judge's reaction to knowledge the tape was fabricated.

III. PETITIONER THOMAS CONTINUES TO SUFFER CONSEQUENCES FROM HIS CONVICTION

As a result of the fabricated tape, Thomas had not only a federal indictment, but a state indictment. The grand jury from Nacogdoches, Texas, where Thomas practiced for ten years and a federal grand jury from Tyler, Texas, listened to the audio tape and formed an opinion from the tape. The Texas Board of Medical Examiners heard the tape and based their decision to revoke Thomas' license on testimony about the tape.

The state judge reviewing the Texas Board proceedings was affected by the audio tape in postponing a review of the board proceedings.[16]

Thomas was severely damaged by the audio tape, the indictments and the federal conviction. To this day, he is not able to practice according to his years of training as a result of consequences *ex maleficio* from the proceedings in 1982 and 1983. The lingering damages to family relations, job relations, self esteem, professional esteem and related are tremendous.

Some circuits make a requirement that petitioners must show lingering civil disabilities as a conse-

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16 Later Attorney Charles Butts dismissed these proceedings without Thomas' knowledge or permission.

quences as a result of a federal conviction to justify vacating sentences already served. *U. S. v. Bruno*, 903 F.2d 393 at 396 (5th Cir. 1990) The Supreme Court has never set a precedent on this issue. The petitioner argues *any* federal conviction has a lingering associated consequences that is damaging.

CONCLUSIONS

The fundamental errors set forth by the petitioner meet all the requirments for issuance of a writ of *coram nobis* which is suited to "such compelling circumstances existing only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *United States v. Mayer*, 285 U.S. 55, at 69.

This Court should use the power vested by the U.S. Constitution and statutory law to correct the manifest injustice evident in this case.

Based on the nature of the errors, the previous prejudicial rulings, and Texas politics from the sentencing court and the Fifth Circuit related to the petitioner, a mandamus should issue from this court rather than remanding to the lower court for adjudication. In the alternative, the merits should be heard by a non-biased court without political ties to Texas.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JOHN HALL THOMAS,

Petitioner,

6:93cv419
(6:82cr46)

UNITED STATES OF AMERICA,

Defendant.

ORDER

On this day came on to be considered Petitioner's Petition for Writ of Coram Nobis . After careful consideration, the Court is of the opinion that the petition should be denied. A memorandum opinion explaining the decision and final judgment will follow in due course. It is , therefore,

ORDERED that the Petitioner's Petition for Writ of Coram Nobis is DENIED with written opinion to follow.

SIGNED this 5th day of April, 1994.

WILLIAM M. STEGER

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JOHN HALL THOMAS,

Plaintiff,

v. 6:93cv419

UNITED STATES OF AMERICA,

Defendant.

ORDER

On this day came on to be considered Mr. Thomas' Petition for Writ of Coram Nobis. After careful consideration, the Court is of the opinion that the petition should be denied.

On August 18, 1982, a federal grand jury returned an indictment charging Mr. Thomas with 61 counts of illegally dispensing schedule II controlled substances and one count of conspiracy. A superseding indictment containing an additional count charging illegal operation of a continuing criminal enterprise was returned on September 29, 1982.

On January 24, 1983, after a lengthy plea hearing, Mr. Thomas pled guilty to Count 2 of the superseding indictment charging Mr. Thomas with unlawfully dispensing the controlled substance Preludin with phenmetrazine in violation of 21 U.S.C. 841 (a)(1) and 1306.04(a). Pursuant to a plea agreement, all remaining counts were dismissed.

On April 15, 1983, Mr. Thomas filed a motion to withdraw his guilty plea. After an evidentiary hearing, Mr. Thomas' motion was denied. Mr. Thomas was

sentenced to 5 years imprisonment and 2 years special parole.

On April 21, 1983, Mr. Thomas filed a notice of appeal alleging that the trial court erred both in accepting his guilty plea without first determining whether the plea had been obtained through coercion and in denying Mr. Thomas' motion to withdraw the guilty plea. In an addendum to his appeal brief, Mr. Thomas called for the trial judge to recuse himself from conducting the evidentiary hearing and sentencing. Furthermore, Mr. Thomas alleged that false information was included in the pre-sentence report. On September 26, 1983, the Fifth Circuit Court of Appeals found Mr. Thomas' contentions, including those contained in his addendum, without merit and affirmed the conviction.

On March 25, 1985, Mr. Thomas filed a Rule 35 motion for dismissal of illegal sentence alleging that the writing of prescriptions does not violate interstate commerce, the criteria established for prosecution under Sect. 841 was not met, and the seizure of records was a violation of due process which precluded a defense. On September 3, 1985, thi motion was denied.

On August 26, 1985, Mr. Thomas filed a motion under 18 U.S.C. Sect. 3568 to be granted credit for time served on bond as "in custody" time and a motion pursuant to Rule 32 regarding the accuracy of the pre-sentence report or modification of the presentence report. These motions were denied on September 20, 1985.

On September 13, 1985, Mr. Thomas filed a notice of appeal for dismissal of the motion for dismissal of illegal sentence. On March 17, 1986, the judgment of the District Court was affirmed by the Fifth Circuit in United States v. Thomas, No. 85- 2646 (February

18, 1986). On October 6, 1986, Mr. Thomas' Petition for Writ of Certiorari was denied.

Finally, on July 23, 1993, Mr. Thomas filed his Petition for Writ of Coram Nobis.

When a defendant is no longer in custody, a writ of error coram nobis is the appropriate procedural vehicle for attacking a conviction. However, the remedy provided by the writ is of limited scope. United States v. Mayer, 235 U.S. 55, 69 (1914). A writ of coram nobis should only be granted when necessary " to remedy manifest injustice." Rener v. United States, 475 F.2d 125, 126 (5th Cir. 1973). Such compelling circum tances exist only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which render the proceeding itself irregular and invalid. Mayer, 235 U.S. at 69.

In this case, Mr. Thomas has not demonstrated anything so extraordinary to warrant the granting of his petition for writ coram nobis. Mr. Thomas' allegations regarding the seizure of his prescriptions and false information in the pre-sentence report have already been brought before this Court and the Fifth Circuit Court of Appeals. These allegations were deemed without merit, and the conviction of Mr. Thomas was affirmed. Furthermore, Mr. Thomas freely and voluntarily pled guilty to one count charged in the indictment. Mr. Thomas has failed to present an error of that fundamental a character as would permit the issuance of a writ of error of coram nobis to vacate the conviction of the sentence which Mr. Thomas has already served. It is, therefore,

ORDERED that Mr. Thomas' Petition for Writ of Coram Nobis is DENIED. SIGNED this 14th day of September, 1994.

WILLIAM M. STEGER

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40428 & 94-41027
Summary Calendar

VNITED STATES OF AMERICA, Respondent-Appellee,

versus

JOHN HALL THOMAS, - Petitioner-Appellant.

Appeals from the United States District Court

for the Eastern District of Texas

6:93-CV-419 (TY-86-46-CP.) & 6:93 CV-419 (6:82-CR-46))

Before POLITZ, Chief Judge, and HIGGIN-BOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:*

John Hall Thomas argues that the district court erred by denying his petition for the writ of coram nobis. The writ is an extraordinary remedy, available

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* Local Rule 47.5 provides: The "publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

to a petitioner who is no longer in custody. See United States v. Morgan, 346 U.S. 502 (1954). For a petitioner to obtain the extraordinary writ, he must demonstrate (1) that he is suffering a civil disability as a consequence of his criminal conviction and (2) "' that the challenged error is of sufficient magnitude to justify the extraordinary relief.'" United States v. Castro, 26 F.3d 557, 559 (5th Cir. 1994) (quoting United States v. Marcello, 876 F.2d 1147, 1154 (5th Cir. 1989)). Thomas's challenge does not justify granting the writ.

We have affirmed without opinion a district court ruling that "newly discovered evidence affords no entree to said writ." United States v. Carter, 319 F. Supp. 702, 705 (M.D. Ga. 1969), aff'd, 437 F.2d 444 (5th Cir. 1971). The district court in that case relied upon dicta from a 1914 Supreme Court opinion stating that "[i]n cases of . . . newly discovered evidence . . . the remedy is by a motion for a new trial," not by a petition for coram nobis. United States v. Mayer, 235 U.S. 55, 69 (1914). See also Reid v. United States , 149 F.2d 334 (5th Cir. 1945) (per curiam) (denying coram nobis petition based upon new evidence because it was essentially an untimely motion for a new trial); Buie v. United States, 84 F.2d 565 (5th Cir. 1936) (denying coram nobis petition construed as an untimely motion for new trial on ground of newly discovered evidence). Indeed, the Eleventh Circuit has read our precedents to bar consideration of newly discovered evidence in a coram nobis proceeding. See Moody v. United States, 874 F.2d 1575, 1577 (llth Cir. 1989), cert. denied , 493 U.S. 1081 (1990).

While we have never explicitly stated that newly discovered evidence cannot be grounds for coram nobis relief, other circuits have held that it can. See e.g., Klein v. United States, 880 F.2d 250, 253-54 (10th Cir. 1989); United States v. Scherer, 673 F.2d 176, 178 (7th Cir.), cert. denied , 457 U.S. 1120 (1982). Those circuits

have held that a coram nobis petition based on newly discovered evidence may succeed if it demonstrates that the evidence could not, in due diligence, have been revealed before trial and that the evidence likely would have produced a different result at trial.

We do not pursue the issue further because Thomas has not demonstrated that his new evidence would have changed the result of his criminal proceeding. His new evidence consists of four items: (1) a transcript of a Texas Board of Medical Examiners hearing of June 1982; (2) a released portion of the Board's investigative file on him; (3) his medical records; (4) and Freedom of Information Act files from the Texas Department of Public Safety. Thomas states in conclusory fashion that his newly discovered evidence shows that the inculpatory tape was fabricated, but he never tells us how his newly discovered evidence supports that defense.

To the contrary, he argues in his appellate briefs that he believes that the tape was fabricated because the voice on the tape does not sound like his. The evidence supporting this argument is not the new evidence produced in his coram nobis petition; rather, it is the old evidence of the tape recording itself. Thomas listened to the tape recording with his attorney on or about September 24, 1982, shortly after his arraignment, according to his own affidavit attached to his coram nobis petition. As he states in that affidavit, he told his attorney at that time that he "did not talk, speak or act like the person on the tape recording." Because Thomas makes the same argument here without the added support of any new evidence, Thomas's writ of coram nobis was rightly denied.

Accordingly, the decision of the district court is AFFIRMED.

THE COURT: All right, you may do so.

CHARLES BUTTS,

a witness called by the government, having been first duly cautioned and sworn to testlfy the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. HARRISON:

Q Would you state your name for the record, please?

A Charles Butts.

Q Mr. Butts, would you give us your professional background for the record?

A I'm a licensed attorney, was licesed in May of 1949. I was licensed in the State of Montana in1954, and I'm licensed in the Districts of Texas, Northern, Western and Southern. I have been admitted for purposes of this case here and plan to file for official admission. I'm admitted to the United States Su reme Court and several circuit courts.

Q Mr. Butts, have you had much experience

advised me, so there was not any problem in connection with the passage of my mother-in-law that would have prevented me trying this case. I want to make that clear.

(PAUSE)

MR. DAVES: I have nothing further, Your Honor.

THE COURT: You may stand down, sir.

(WITNESS STANDS ASIDE)

MR. HARRISON: Your Honor, we have one other witness we'd like to call, and I would ask if Mr. Butts could question him. That is Dr. Thomas, Sr.

THE COURT: All right. Come forward, please.

JOHN FULTON THOMAS,

a witness called by the government, having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

(Taken from p. 73 of Sentencing Transcript 4/15/83)

NACOGDOCHES COMPUTER SYSTEMS
320 EAST HOSPITAL STREET
P.O.DRAWER 1978
NACOGDOCHES,TEXAS75961
713/564-0258

31 March 1983

PERSONAL & CONFIDENTIAL

Handwritten note on this said received about 4/6/83. File stamped 4/15/83.

Judge William Wayne Justice

Federal Court Building

Tyler, Texas

Dear Judge Justice:

I came before your court on January 24, 1983 and entered a plea of guilty: I have regretted this decision from that time until now. I would like to give you a few circumstances surrounding the decision so you will understand my feeling and my being so upset that day. I believe I am innocent of the charges brought against me and have worked very hard from the onset to organize my defence and provide for my family. About three weeks before the scheduled trial my lawyer, Charles Butts, called me to San Antonio to discuss a plea bargain arrangement. The elements of the bargain were for me to plead guilty to one charge and the prosecution would do the following:

1. Drop all remaining Federal charges.
2. Drop the charges pending in Nacogdoches.
3. Call off the pending prosecution in the Northern District of Texas.
4. Recommend a probated sentence.
5. Allow me to pick the charge I wanted to plea to.

My answer was an unequivocal "no" to the entire plea bargain. I said I was innocent and saw no reason to not go through with the trial. He seemed to

accept my decision and we made preliminary plans for the trial. We were supposed to meet in Tyler to go over the records the next week and I was to work on obtaining an expert witness for the trial. A few days later he called and said he was going to be too busy to get to Tyler and we would go over the records the weekend before the trial. Five days before the trial date of January 24, he called and wanted me in Austin for a meeting with he and my Dad. At this meeting, the plea bargain was againadvised. I was told the evidence by the prosecution was too substantial and that by pleading guilty or no contest to one charge, I would save myself from a prison term. He had convinced my Dad of this so this was an arm twisting session to get me to plead. He advised that a "no contest" plea would be acceptable. My answer was again "no." I returned to Dallas where I had been working on the case and my computer business.

Thursday before the scheduled trial on Monday, I returned from Dallas to Nacogdoches with my material for the trial. Other members of my family had been recruited to convince me that for my own good, I should plead no contest. They could not contact me as I was on the road, but my wife spent several hours on the phone with Mr. Butts and other family members with the same message repeated over and over again. If he pleads no contest to one charge, he will stay out of prison: if he goes through with the trial, he will be sent to prison. By the time I arrived home, she was hysterical. Late that night, I finally said I would make a plea of no contest in exchange for the elements of the bargain.

I was under the impression that by pleading "no contest," you would weigh the evidence and make a ruling rather than a jury. The next day I came to Tyler to discuss this with you if possible; however, Tom Sanders, my probation officer, said it was not possible for me to talk to you until Monday. I accepted this,

and returned to Nacogdoches that same Friday. He expressed some surprise that you would accept this plea, but assumed, I guess, that it had been worked out.

I advised my lawyer that same day that I wanted to plead to charge number fifty-five, Joe Hart. This was a grossly obese black man that was crippled. I was unable to weigh him and had to examine him in the car. Because I did not weigh him, I could justify a plea of no contest in my own mind.

The meeting before the trial in the prosecuting attorney's office was much different than I expected. I was told for the first time that I had to plead "guilty" and could not plea "no contest." I was also advised that I must plead guilty to charge number one i.e. I could not pick my charge. This upset me greatly as I was lead to believe by my attorney that I could pick my charge and enter a no contest plea. I was cursed and called among other things the "most selfish son-of-a-bitch on earth" and that I had no feeling for my family. I finally managed to scribble on the plea.

You are aware of the episode before you in the courtroom. I must apologize for my poor composure, but I felt I had been trapped like an animal and was being herded to a big cliff. After you would not accept a "guilty" plea on the first count, I had made up my mind to change my plea to "not guilty." What worried me was that I did not trust or have any confidence in my lawyer. When my lawyer and I went to the back of the court to talk, I received my next cussing and was advised I was, "the stupidest son-of-a-bitch on earth," and that if "you do not make it good on this next count, I am going to have you put in a mental hospital." This threat hit home, and I perjured myself on the next count to get a guilty plea.

I have never been so disgusted and discouraged in my entire life as when I left your courtroom. I knew

I should have plead not guilty, but I also new my wife and four children could not survive if I was put in a mental hospital. I knew my lawyer and the prosecuting attorney had lied about my pleading "no contest" and "picking" my charge, but I hoped my lawyer was right about recommending a probated term.

As the weeks have passed since that day, I have worked to provide for my family and get friends and patients to write letters on my behalf. I was encouraged at first, that they were telling me the truth about a recommended probated term. But as the weeks have passed and I have talked with Mr. Sanders and others, I realize that was a lie also. In fact, the entire plea bargain effort was made in order to get me to plead guilty and send me to prison. I read an article in the Houston paper about the San Jacinto County Sheriff and his plea bargain. The article mentioned that Judge McDonald must approve the plea bargain. So, as I understand it, I have no guarantee of anything. When I explained to Mr. Sanders about the plea bargain elements given to me, he mentioned that I should withdraw my plea. I did not know this was possible. I asked him again about it Monday, March 28, and he said I would have to talk with my lawyer. After the courtroom episode, I would rather find a new lawyer than talk with Mr. Butts.

Judge Justice, I have great respect for you and you have been the only inspiration throughout this entire ordeal. I know that justice has not been done in my case and would like the opportunity of bringing it to trial. I am asking you for the following:

1. To withdraw my guilty plea.
2. To obtain new counsel.
3. To have time to acquaint my counsel with facts of the case and bring it to trial.

I am asking these things because I AM not guilty and would like to prove it before the court. In addition, I think the case is an important landmark case because of the extent of the governments involvment in seizing medical records and bringing a physician under the criminal enterprise statute.

It is not my intention to cause trouble and expense to the court system with respect to my case; however, I don't feel it is right for the prosecuting attorney to bargain and tell my lawyer lies when I have my past Air Force history spread over the front pages of the papers because I am honest and tell the truth before the court. If indeed, I had been told the truth, I would not be writing this letter. My feeling would be the same even if I was told that a probated sentence was recommended and you were going to approve one. My only satisfaction will be to have the case tried on its merits.

I have enclosed a book that I wrote about my research and methods in treating obesity. The reasons I am sending this to you are:

1. As an attest to my expertise in the treatment of obesity.
2. As an attest to my sanity.
3. To give you an idea about I have faced in the past 11 months.

Judge Justice, I make no apologies for using the terminology of "gestapo" in the book as the tactics used by law enforcement agencies against me have been just that strong. In the past weeks, I have been made aware of an act that is so against the word justice that it defies expression. Prior to the trial, a meeting was called of the doctors that might testify on my behalf. At this meeting, they were advised or threatened would be a better word, not to get involved or they would be putting their own licenses in jeopardy. This and other

acts that I will be glad to document add more credence to my contention of an organized conspiracy. The prosecuting attorney advised one witness that all phones were tapped and they were monitoring my every move and would know if he made any contact with me. I did not hear from him from that day forth. The prosecuting attorney has given the impression that anybody even remotely associated with me can be implicated as a co-conspirator and involved. There are only a handful of people who have not been frightened. My wife has been reduced to a nervous, fearful, wreck by the oppression. For this reason, I have moved my family out of Texas and am employed as a computer software consultant elsewhere.

Judge Justice, I only want a fair trial and to be treated like a citizen of the United States. In view of what has happened, a fair trial will be difficult, but I want to be tried in open court. I am asking you for this opportunity. I will be glad to read this letter in court or follow the procedure for withdrawal of a plea.

If the prosecuting attorney wants to add all of the charges again as well as those on the state level, this will be fine. I am not trying to get out of facing any indictments by trickery. I feel more confidence with a jury than with a lawyer telling me the case is hopeless. Also, Mr. Butts has been paid for his time thus far.

I am enclosing a letter written to the prosecuting attorney in August of last year requesting copies of my medical records. To me, this seizure is a direct violation of the Fifth Ammendment and invades my privacy as well as the Privacy of my patients. The doctor patient relationship and record of that relationship is no different than any other private transaction between two people. When a seizure is accomplished without consent of either of the two parties involved, to me the fifth ammendment has been violated. In addition, these records are my defense and I have not

had the use of these records to defend myself before the Board of Medical Examiners or Federal Court. The search warrant provided for copies of all records requested by myself: I have made repeated requests which have been ignored. One attempt was made to return some records, but Mr. Hitt would not acknowledge either the number of records or the completeness of the records. The seizure of the Federal government of my complete medical records has struck fear into every doctor who has heard about it--and with good reason. My medical practice was destroyed by this act regardless of the outcome of the trial. Had copies of the records been made and given to me as promised by the search warrant and Mr. Hitt, I could have worked with my patients and possibly have salvaged some confidence. The records have been gone almost a year along with immunization records, birth certificates of my own children, insurance information necessary for me to get paid for services, etc. There is no telling how much money,that I needed desperately that has been lost because I have no record to file the insurance. To me this is a criminal act by the prosecutor along with the criminal act of threatening trial witnesses and lying to my lawyer about terms of a plea bargain. To whom does this man answer?

Sincerely yours,

John Hall Thomas

Enclosures (2)

cc Mr. Charles Butts
Mr. Tom Sanders
Senator John Tower
Attorney General Smith

Transcript from Allen Byrd tape of 4/14/82:

Bruce: Stand with your back to the scale-stand on the scale.

Allen: Get on?

Bruce: Okay, step off the scales and turn around exactly where you are, alright?

Allen: Okay, How tall was I?

Bruce: Five foot 4 and 1/2 inches.

Allen: What?!

Bruce: I measured you.

Allen: I thought I was taller than that.

****

Dr. Thomas: How much weight do you want to lose?

Allen: Umm...about 15 pounds.

Dr. Thomas:What's your zip code?

Allen: 77001 - 1 - 77001

Dr. Thomas: You want to try some of the scripts?

Allen: Yea.

Dr. Thomas: Uhh.

Allen: How ... how many can I get?

Dr. Thomas: Huh?

Allen: How many will I get?

Dr. Thomas: 28..... a four weeks supply.

Allen: There's no way I can get two more? 'Cause I'm going to have to ....

Dr. Thomas: Two months?

Allen:I'm going to have to give some of them away.

Dr. Thomas: Uhh. No. We do that we wouldn't be in business very long, you know.

Allen: No way, Doc? 'Cause I'm gonna shoot up 20 of 'em.

Dr. Thomas: Pardon me.

Allen: I'm gonna shoot up 20 in five days.

Dr. Thomas: Well, I mean, we run the office... we got to run it just like we's legal...that's the only way we can do it. So, that's the only way... uh only way we can stay in business. Okay. You want 75's?

Allen: Yep.

Dr. Thomas: Okay, that'll be $60.

Allen: Okay.

Dr. Thomas: Come back. You can come back May 12 or anytime after that, just bring that card.

Allen: Okay ....okay.

Dr. Thomas: You'll have to bring your girlfriend in or something like that, you know.

Allen: Well, looka...I got four of 'em I could bring in but....

Dr. Thomas: Are they overweight?

Allen: Yeh, can I.. and I'll just .. you know...pay you up front.

Dr. Thomas: Well, just give them the money for each time they come through or something like that.

Allen: Okay, 'cause they gonna try to ... you know....they gonna try to get over on me.

Dr. Thomas: Well, they won't get over ... It'll just be $60 for each one. If you want to give me the names of the ones you paid for or something, I'd rather just give it to them, you know.... then they come in for something.

Allen: Okay, well, I'll just give you the names...and uh....so, is there any way I can come in and ...with 'em?

Dr. Thomas: Well, come in with them....well, you just come in and ..uh...you don't think they'll just bring their sixty dollars and pay-

Allen: They'll bring the $60 but they're gonna take something else.

Dr. Thomas: They'll come back.

Allen: They're gonna try to..try to,... well....I don't know

Dr. Thomas: They're gonna give it to me now...

Allen: They're gonna probably try to rip me... I got to keep eye contact on 'em.

Dr. Thomas: Okay, well .... if you come in.. and uh, in other words, well, what I mean the only way I can do is give them the prescription.

Allen: Okay...yeah... I understand that.

Dr. Thomas: If you want to.....

Allen: I just want to hold the money if I could .. if I could...

Dr. Thomas: Then if you want to come in before them and tell 'em you're paying... tell me you're paying for these three and give me a list.

Allen: Okay, that's all, Okay.

Dr. Thomas: Alright.

Allen: Okay. Thank you.

JOHN H. THOMAS, M. D.
320 EAST HOSPITAL STREET
P.O. DRAWER 1978
NACOGDOCHES, TEXAS 75961
713/564-0258
August 12, 1982

Mr. Christian Harrison
U.S. Department of Justice
P0 Box 1049
Tyler, Texas 75710

Dear Mr. Harrison:

I am in receipt of your letter dated August 6, 1982. I repeat my request for all of my medical records or copies thereof. You asked me to give you specific records that I require when you have my entire filing system, records, rolodex files and everything that I need to conduct business. There is no justice in seizing a man's records in order to find evidence to build a case. Not only do you put me in jeopardy by such action, but you put my patients in jeopardy that are in need of medical care or emergency care. I have practiced medicine with the same high standard for the past ten years and consider your actions completely unjustified and irreparable damaging.

I explained to Mr. Hitt that I have no knowledge of which of my patients are going to become sick on any given day. You are asking me to give you names of specific records from memory when I do not have my records numbers memorized nor do I know which patients are going to become sick.

I view these actions as an attempt to completely destroy my practice. Mr. Hitt explained that for political reasons, he had been on my case for the past three

years just trying to find evidence. If this is justice, the United States is in a bad condition.

Mr. Harrison, I have a wife of ten years and support four children. I am a public speaker, I am a computer software expert, I have my own construction company, I have written books and poems, and I am active in spreading the gospel. I have never resorted to illegal, clandestine, or wicked ways to make a living. Your actions and the conspiracy that you are party to is an insult to the word "justice."

In your last paragraph of your letter, you state that I have repeatedly been advised that the United States will provide copies, and I have refused copies. This is a total falsehood. Again, I desire copies of all of my records. I need the rolodex files in addition to these copies so that I can find a patient among my records without having to go through the entire bunch of records. I demand proper acknowledgement on receipt of these records.

Sincerely,

John-Hall Thomas M. D.

cc Mr. Charles Butts
Mr. James Branton
Mr. Pat Robertson
Senator John Tower
Attorney General Smith

JHT/rc

AFFIDAVIT

Affiant has been assisting in an undercover operation in purchases of controlled substances including phenmetrazine and ritalin by investigators of the Texas Board of Medical Examiners and an investigator of the Texas Department of Public Safety, Narcotics Section, over the past five months approximately. Affiant has assisted in surveillance during these controlled buys of controlled substances and has discussed these busy in detail with the above investigators. These officers,whose names I do not wish to reveal as they are continuing work in an undercover capacity have been known to me for several years and they have worked in numerous criminal investigations where doctors, pharmacists, and drug dealers were illegally dispensing drugs. The undercover officers have noted and told this officer over the past several weeks that they have received prescriptions for Schedule II Controlled Substances for nonmedical purposes in violation of state and federal law. This affiant has listened in the last week to one tape made approximately one month ago in which an undercover officer told the doctor he was going to "shoot up" the drugs all at once, and the doctor gave hiin a prescription for the controlled substance. On the same tape, the undercover officer told the doctor he needed more controlled substances to sell, and he was told by the doctor to bring in some girls, so he could give him prescriptions under those girsl' names. This affiant had also talked to numerous persons in the past year known to him to be drug addicts and sellers of illegal drugs who were illegally receiving prescriptions for.controlled substances from the doctor under numerous fictitious names. I verified this information by recovering the prescriptions from the doctor passed at various pharmacies in the fictitious names. In addition, in an undercover capacity, I have over the past two years and as recently as two weeks ago observed at the doctor's office persons known to me by experience

as a narcotics investigator to be dealers in controlled substances receiving prescriptions for controlled substances from the doctor. This experience includes arresting some of these persons for narcotics violations and by learning from other narcotics officers and reviewing "rap sheets" that these persons had controlled substance violations.

I have also talked to Waylon Bullard in the past two weeks of the DPS Narcotics Section, who made one undercover buy of a prescription for a controlled substance from the doctor approximately six weeks ago and he told me and through the above described personal surveillance and reports, I know that under the gise of operating a "weight clinic", the doctor is illegally prescribing controlled substances for non-medical purposes to drug dealers and drug addicts for personal profit to himself. The doctor maintains "records" of these "patients" in the premises described in the Affidavit for Search Warrant.

5/19/82

John Hitt

This affidavit was attached to the search warrant used to seize all medical records on 5/19/82.